NO. 83452-1

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

KRISTINA R. GRIER, RESPONDENT

Court of Appeals Cause No. 36350-0-II
Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 06-1-00897-1

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED.

1. Whether the Court of Appeals deciding the case on direct appeal regarding facts and allegations outside the record conflicts with ***State v. McFarland***, 127 Wn. 2d 322, 899 P.2d 1251 (1995)?

2. Whether the Court of Appeals decision finding ineffective assistance of counsel where the defendant's decision was to seek an acquittal conflicts with the Supreme Court's decision in ***State v. Hoffman***, 116 Wn. 2d 51, 804 P.2d 577 (1991)?

3. Whether a trial court is required to *sua sponte* instruct the jury on lesser included offenses, where neither party has requested them and the defendant has specifically declined them?

4. Whether, in light of the Court of Appeals opinion, a defendant may pursue a strategy of acquittal only, to the exclusion of lesser included offenses?

B. STATEMENT OF THE CASE.

1. Procedure.

On November 9, 2006, Kristina Ranae Grier, hereinafter "defendant," was charged by corrected amended information with murder in the second degree for the death of Gregory Scott Owen. CP 6-7. The State also alleged a firearm sentencing enhancement. *Id.* On April 11,

2007, trial began. RP (4/11/07) 111. On May 1, 2007, the defendant was convicted of murder in the second degree. CP 120. The jury found that the defendant was not armed with a firearm at the time of the offense. CP 121. On May 25, 2007, the defendant was sentenced to 220 months in custody. CP 136-146.

The defendant and the State filed briefs with the Court of Appeals. The principal issue was whether the defendant should have been evaluated for competency to stand trial; and whether a subsequent judge could revoke the order for the competency evaluation. *See*, Appellant's and Respondent's Briefs. At oral argument, based on an allegation made by the defendant in her Statement of Additional Grounds, the Court of Appeals ordered supplemental briefing on the issue of ineffective assistance of counsel for failure to propose instructions on the lesser included offenses of manslaughter in the first and second degrees.

On June 6, 2009, the Court filed an opinion reversing the conviction. The Court held that defense counsel was ineffective for failing to propose the instructions on lesser included offenses. On July 22, 2009, the State filed a Motion to Reconsider. On July 9, 2009, the Court of Appeals denied the motion.

2. Facts

The evening of February 21, 2006, the defendant was at a local Pierce County casino. RP (4/11/07) RP 124, 126-127. When the defendant returned home, she indicated that the victim, Gregory Owen wanted to hang out at the house. RP (4/11/07) 127-128. The victim, his fiancée, Michelle Starr, and their daughter went to the defendant's home. RP (4/11/07) 215-217. The defendant's son, Nathan, knew the victim, and the defendant had met the victim through Nathan. RP (4/11/07) 124, 128.

On the night of the murder, everyone was drinking. RP (4/11/07) 182. The victim and the defendant were both intoxicated. RP (4/11/07) 139, 142, 147, 182.

The defendant became upset about some missing food. RP (4/11/07) 132-133. The defendant went to her room and began crying. RP (4/11/07) 133. Nathan and the victim tried to calm her. RP (4/11/07) 133, 134.

The defendant owned several guns. RP (4/11/07) 135. She owned a couple of 9 millimeter handguns. *Id.* She also had a 12-gauge shotgun and a .22 caliber rifle. RP (4/11/07) 136.

Starr agreed to drive the defendant to the liquor store to purchase more alcohol. RP (4/11/07) 218. Starr asked the defendant to leave the guns she kept in her purse behind. RP (4/11/07) 219. When they were

driving to the second liquor store, Starr saw the guns in the defendant's purse. *Id.*

When Starr and the defendant arrived back at the house, all parties continued drinking. RP (4/11/07) 222. The defendant and her son soon began to argue. RP (4/11/07) 226, (4/12/07) 418-419, 431. The victim got involved in the argument and struck Nathan. RP (4/11/07) 141.

Nathan believed that both of the defendant's handguns were in her purse. RP (4/11/07) 146. When the defendant was looking away, the victim took the defendant's purse. RP (4/11/07) 147. Nathan then carried the defendant to her room. RP (4/11/07) 147. The victim began unloading all of the defendant's handguns. RP (4/11/07) 148.

The victim had one of the defendant's handguns. RP (4/11/07) 149. Nathan told the victim that he could not keep the gun because the defendant would call the police. RP (4/11/07) 149-150. The victim became upset and put the barrel of the gun in Nathan's mouth and told him that the gun was his. RP (4/11/07) 150-151. Nathan told the victim that he had to leave. RP (4/11/07) 151. The victim put the gun in his car. RP (4/11/07) 238.

The victim and Nathan started putting the victim's things into the victim's car. RP (4/11/07) 151. When the victim and Nathan were outside, the victim fired a shot from the gun at a neighbor's house. RP

(4/11/07) 152, (4/12/07) 289-290. After the victim fired a shot, Nathan heard the defendant asking if they had her gun. RP (4/11/07) 153. Nathan and the victim tried to tell the defendant that the sound she heard was a bottle rocket. *Id.*

The victim later punched Nathan in the face after Nathan refused to provide him the telephone number of a mutual acquaintance. RP (4/11/07) 155-156, 241. The victim and Nathan began to fight. The defendant told the victim to get off of Nathan. RP (4/11/07) 158-159. The defendant told the victim and Starr to leave. RP (4/11/07) 158.

The victim and his fiancé, Starr, began to leave. RP (4/11/07) 243-244. The defendant armed herself with a shotgun, and went to the victim's car. RP (4/11/07) 160, 244, (4/12/07) 453. The defendant cocked the shotgun and pointed it at the victim and Starr. RP (4/11/07) 244-245, (4/12/07) 287, 453. The victim ultimately disarmed the defendant after Starr struggled with her and hit her head on the ground several times. RP (4/11/07) 246. Nathan called the police. RP (4/11/07) 160.

The defendant returned to the house and told Nathan that the victim took her guns. RP (4/11/07) 162. When the victim could not find his keys, he went back into the house to look for them. RP (4/11/07) 248.

The victim and the defendant got into an altercation. RP (4/11/07) 165. No one saw the shooting. Nathan heard a bang and ran out of the

house. RP (4/11/07) 167. Starr heard the gunshot, and ran to the front door. RP (4/11/07) 249. The victim grabbed his chest and started to exit the house. RP 250-251. Starr followed the victim out of the house. RP (4/11/07) 252.

Police responded to the scene. RP (4/12/07) 300-301. One of the officers detected an obvious odor of alcohol coming from the defendant. RP (4/12/07) 375. Her speech was consistent with someone who was intoxicated. *Id.* The defendant's blood alcohol level, tested later that morning at a hospital, was determined to be .16. RP (4/18/07) 12-13.

Police recovered a semiautomatic pistol from the victim's vehicle. RP (4/16/07) 518-519. Police found a large pool of blood in the hallway of the residence and a trail of blood leading out the front door. RP (4/16/07) 590. Police searched the residence for the murder weapon, but was unable to find it. RP (4/16/07) 593. Police were able to locate the bullet, which had passed through the victim's body and lodged in a wall. RP (4/16/07) 594, 596.

The bullet that was recovered was determined to have come from a Hi-Point firearm. RP (4/17/07) 683, 705. A Hi-Point firearm box was located in the defendant's bedroom. RP (4/17/07) 633, 651.

A bloody footprint was left near the victim's body, indicating that someone had walked through the victim's blood. RP (4/16/07) 562, 633.

A pair of shoes were found in the defendant's bedroom that were "not dissimilar" to the pattern of the bloody footprint. RP (4/16/07) 564, 591. A forensic scientist examined the boots and determined that the blood on the boots matched the victim's DNA. RP (4/17/07) 726, 737-738. A pair of pants were also recovered from the defendant's bedroom had blood on them that matched the victim's DNA. RP (4/16/07) 592, (4/17/07) 738.

The Pierce County Medical Examiner's Office performed an autopsy on the victim. RP (4/17/07) 669-670. The medical examiner determined that the cause of death was a gunshot wound to the chest. RP (4/17/07) 670. The medical examiner also determined that the victim had a blood alcohol level of .16 in his system, and that he also had ingested marijuana. RP (4/17/07) 680.

C. ARGUMENT.

1. A DEFENDANT HAS THE RIGHT TO PURSUE A DEFENSE STRATEGY OF HIS OR HER OWN CHOOSING, INCLUDING ACQUITTAL ONLY.

Art. I, sec. 22 of the Washington Constitution guarantees an accused many rights. He has the right to represent himself, even despite warnings of the court. ***State v. Vermillion***, 112 Wn. App. 844, 850-851, 51 P.3d 188 (2002). He also has the right to a public trial, including the right to present a defense. ***State v. Maupin***, 128 Wn.2d 918, 924, 913

P.2d 808 (1996). The right to present a defense is limited to admissible, relevant evidence, but by little else. ***State v. Lord***, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007).

The legal system, and the criminal justice system in particular, is an adversarial system. In it, counsel represents and advocates for the defendant. *See, gen'lly*, ***Strickland v. Washington***, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The defense decides trial strategy and how to conduct his case. ***State v. Cross***, 156 Wn.2d 580, 606, 132 P.3d 80 (2006).

The relationship between a criminal defense attorney and the client is a delicate balance of the client's wishes and the professional judgment of the attorney. This is reflected in the Rules of Professional Conduct (RPC). Under RPC 1.2(a) the client makes the general decision and: "a lawyer shall abide by a client's decisions concerning the objectives of representation." While the lawyer must "consult with the client as to the means" by which the goals are to be pursued, the lawyer exercises professional judgment. "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." *Id.*

An attorney who complies with the RPC 1.2 cannot be said to be deficient in his representation. Where a defendant decides, after

consulting with counsel, to reject a lesser charge, whether as a plea or a jury instruction, and seek an acquittal only, counsel must abide by that decision. That is what occurred in the present case. Therefore, counsel's performance was not deficient.

2. WHERE A DEFENDANT MAKES AN INFORMED STRATEGIC TRIAL DECISION, IT IS NOT INEFFECTIVE ASSISTANCE OF COUNSEL WHERE THAT STRATEGY IS UNSUCCESSFUL.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Thomas***, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). A defendant must demonstrate (1) that his attorney's representation deficient; fell below an objective standard of reasonableness, and (2) that he or she was prejudiced by the deficient representation. ***Strickland***, at 687; *see also* ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

The decision of whether to request an instruction on a lesser-included offense is a matter of trial strategy. *See* ***State v. Hoffman***, 116 Wn.2d 51,112, 804 P.2d 577 (1991). Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. ***Strickland,*** 466 U.S. at 690.

It is not unusual for a defendant to complain to an appellate court when the defendant's choice of trial strategy fails. In ***State v. Hoffman***, *supra*, the defendant was charged with aggravated murder in the first degree. There, as in the present case, the defendant, after consulting with counsel, declined instructions on lesser included offenses and argued that the State had failed to prove the charge. After the jury convicted as charged, the defendant argued that the court should have instructed on the lesser offense anyways. The Supreme Court found no error by the trial court:

> The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not have included offense

> instructions given was clearly a calculated defense trial tactic...

116 Wn.2d at 112.

Recently, Division I of the Court of Appeals has disapproved of "all or nothing" strategies. *See* ***State v. Ward***, 125 Wn. App. 243, 104 P.3d 670 (2004), and ***State v. Pittman***, 134 Wn. App. 376, 166 P.3d 720 (2006). In the present case, Division II relied heavily on the reasoning in ***Ward*** and ***Pittman***, including quoting from dicta in ***Keeble v. United States***, 412 U.S. 205, 212-213, 93 S. Ct. 1933, 36 L. Ed. 2d 844 (1973). However, as pointed out in detail below, a different panel of judges in Division I more recently backed away from the holdings in those cases. The Court criticized the prior decisions for failing to give enough deference to the strong presumption of the effective assistance of counsel in such cases, and specifically criticized reliance on the dicta quoted from ***Keeble.***

A little over a month after Division II filed its opinion in ***State v. Grier***, 150 Wn. App. 619, 208 P.3d 1221 (2009), Division I filed ***State v. Hassan***, 151 Wn. App. 209, 211 P.3d 441 (2009). Hassan was charged with possessing marijuana with intent to deliver, based upon observations by a police officer, and a subsequent search of a nearby backpack. At trial, Hassan pursued an "all or nothing" strategy. He denied selling the marijuana, and possession of the backpack containing much of the

evidence. The defense conceded that he possessed marijuana, but challenged the evidence of intent to deliver. The court asked if the defense was going to propose an instruction on the lesser included offense of possession, the defense replied that they were not. The defense went on to urge an acquittal, arguing insufficient evidence of intent to deliver. The jury convicted. In his appeal, Hassan alleged that his attorney was ineffective for failing to seek the lesser included offense.

The Court of Appeals held that because the decision not to request an instruction on a lesser included offense was strategic or tactical, it was not ineffective assistance of counsel. In its decision, Division I quoted from ***Hoffman***, 116 Wn.2d at 112 (included in argument above). The Court distinguished ***State v. Ward***, 125 Wn. App. 243, 104 P.3d 670 (2004). The Court questioned the validity of the holdings in ***Ward*** and ***State v. Pittman***, 134 Wn. App. 376, 166 P.3d 720 (2006). ***Hassan***, 151 Wn. App. at 221, n. 6. The Court questioned the reliance of both cases on distinguishable dicta in ***Keeble v. United States***, 412 U.S. 205, 212-213, 93 S. Ct. 1933, 36 L. Ed. 2d 844 (1973). *Id.* Like ***Ward*** and ***Pittman***, ***Grier*** uses the same questionable quote from ***Keeble***. ***Grier***, 150 Wn. App. at 643.

Other jurisdictions have recognized that presenting the jury with an all-or-nothing choice is a reasonable trial strategy because, although it

involves a risk, it increases the chances of an acquittal. *See* ***Collins v. Lockhart***, 707 F.2d 341, 345-46 (8th Cir. 1983) (Gibson, J. concurring); ***United States ex rel. Sumner v. Washington***, 840 F. Supp. 562, 573-74 (N.D. Ill. 1993); ***Parker v. State***, 510 So. 2d 281, 286 (Ala. Crim. App. 1987); ***Henderson v. State***, 664 S.W.2d 451, 453 (Ark. 1984); *see also* ***Heinlin v. Smith***, 542 P.2d 1081, 1082 (Utah 1975) (court noted that counsel's failure to request a lesser included offense instruction was not unreasonable, but a likely tactic involving the idea that an all-or-nothing stance might better lead to an outright acquittal). ***Kubat v. Thieret***, 867 F.2d 351, 364-365 (7th Cir. 1989), *cert. denied*, 493 U.S. 874 (1989) (seeking lesser-included instruction in kidnapping case would conflict with alibi defense); *see also* ***Moyer v. State***, 620 S.E.2d 837 (Ga. App. 2005), *overruled on other grounds by* ***Vergara v. State***, 283 Ga. 175, 657 S.E.2d 863 (2008); ***Autrey v. State***, 700 N.E.2d 1140, 1141 (Ind. 1998) (a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense).

In ***Jefferies v. Blodgett***, 5 F. 3d 1180 (9th Cir. 1993), a Washington capital murder case, the defendant chose to maintain his complete innocence throughout the trial and penalty phase. In his federal habeas corpus proceedings, he alleged that counsel was ineffective for failing to present mitigation evidence in the penalty phase. The 9th Circuit found that counsel was not ineffective for failing to pursue a

strategy that the defendant had rejected. Counsel was complying with the defendant's decision that such evidence not be presented. *Id.* at 1197.

Recently, the United States Supreme Court again rejected a claim of ineffective assistance of counsel where the defendant made a strategic decision on advice of counsel. In ***Knowles v. Mirzayance***, -- U.S.--, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009), the defendant was tried for premeditated murder in the first degree in State court in California. He pleaded not guilty by reason of insanity (NGI). Under California law, the trial was bifurcated into the guilt phase and the NGI phase. The jury found the defendant guilty of premeditated murder, rejecting the defendant's argument that his mental illness prevented him from forming the requisite mental state.

In the NGI phase, the burden shifted to the defense. Defense counsel was relying on testimony from the defendant's parents, in addition to the psychologists who had already testified in the guilt phase. When the parents declined to testify, the defense was left with the testimony of the doctors, which the jury had already rejected by its verdict. Counsel recommended that the defendant drop his NGI plea, because it was extremely unlikely that they would prevail. The defendant agreed.

The Supreme Court held that even though the defense had "nothing to lose" by proceeding, the defense attorney's advice was not deficient. Citing ***Strickland***, the Court noted that counsel had taken into account the

law and evidence. Counsel had weighed the options before making his recommendation to the defendant.

In ***Hoffman***, the defendant was charged with aggravated first degree murder for killing a police officer, thereby facing a sentence of life without parole. In the present case, charged with second degree murder based on a confused, drunken altercation, the defendant also chose to pursue an acquittal only. Here, the Court of Appeals observed that an "all or nothing" defense was risky under the circumstances. ***Grier***, 150 Wn. App. at 644. While true, the risk taken in ***Hoffman*** was even greater. The defendant made a strategic choice to seek an acquittal after consulting with her attorney. Under ***Hoffman***, this is trial strategy, not ineffective assistance of counsel.

3. ALLEGATIONS OUTSIDE THE RECORD REGARDING COUNSEL'S PERFORMANCE OR ADVICE MUST BE RAISED IN A PERSONAL RESTRAINT PETITION.

In ***Grier***, the Court of Appeals accepted the defendant's unsupported allegation that defense counsel did not explain the option of offering instructions on the lesser included offenses of manslaughter. 150 Wn. App. at 632. A defendant alleging ineffective assistance of counsel has the burden to show, from the record, the absence of legitimate strategic or tactical reasons that would support the challenged conduct by counsel ***McFarland***, 127 Wn.2d at 336.

Here, the record contradicts the defendant's assertion. The record reflects that the defense did propose instructions on the lesser offenses of manslaughter in the first and second degrees. CP 59, 61, 65. The defense counsel only withdrew the proposed instructions on the lesser offenses after consulting with the defendant regarding the options, and with her specific assent:

> MR. CLOWER: Your Honor, 3 through 9, I'm withdrawing. And I have spoken to Ms. Grier about lesser includeds, what all that means, and we are, after our discussion, not going to submit any lesser includeds. So that, I think, encompasses everything, 3 through 9.
>
> THE COURT: This is something that she agrees with; is that correct, Ms. Grier?
>
> THE DEFENDANT; Yes, ma'am.

7 RP 852.

If there are additional facts outside the record regarding this issue, the defendant must file a collateral attack, such as a Personal Restraint Petition, so that the record can be supplemented. ***McFarland***, 127 Wn.2d at 335.

In the past, the Court of Appeals has cautioned against speculating on the choices and reasons for strategies the defense pursues. In ***State v. Norman***, 61 Wn. App. 16, 808 P.2d 1159 (1991), the defendant was charged with manslaughter for failing to obtain medical treatment for his

diabetic son. The defendant was a member of an extremist religious group. After he was found guilty, he alleged counsel was ineffective for failing to present a mental defense. The Court declined to consider the allegation without additional information:

> The contentions now made would require us to make a determination of the truth of defendant's ex parte post trial claims concerning matters occurring out of court. For all we know, an evidentiary hearing would disclose that the defendant's present statements are controverted and that the decisions made concerning trial management were tactical decisions of trial counsel in discharge of his duty to best represent the defendant. If there be a basis for the claims now made in an effort to show that, after considering the entire record, the accused was denied a fair and impartial trial, that basis must be established in a separate proceeding, the merits of which we do not prejudge.

61 Wn. App. at 27, quoting ***State v. Humburgs***, 3 Wn. App. 31, 36-37, 472 P.2d 416 (1970). Inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's handling of a case, including trial decisions. ***Strickland***, 466 U.S. at 691.

These cases, and the strong presumption of effectiveness of counsel, are consistent with the sage observation in Comment [1] of RPC 2.1:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a

> lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

In the present case, the record contradicts the defendant's current assertion on appeal of ineffective assistance of counsel. The record reflects that the defense made a decision regarding instructions on lesser included offenses, and chose an acquittal only or "all or nothing" strategy. The record does not reflect how the decision was made, or for what reasons. The reviewing Court must not speculate on how that decision was made. The Court must presume that the decision was made in consultation between the attorney and the defendant.

The defendant's allegation that counsel failed to inform her regarding lesser included offenses must be raised or treated as a PRP where information outside the record may be presented to the Court, so that it may make an informed decision on the issue.

4. THE TRIAL COURT SHOULD NOT BE REQUIRED TO *SUA SPONTE* INSTRUCT THE JURY ON LESSER INCLUDED OFFENSES WHERE NEITHER PARTY HAS REQUESTED THEM AND ESPECIALLY WHERE THE DEFENSE HAS SPECIFICALLY DECLINED THEM.

Courts do not give, nor is it error to fail to give instructions which have not been requested or proposed by the parties. ***State v. Roberts***, 142 Wn. 2d 471, 501, 14 P.3d 713 (2000). Nor are instructions on lesser

included offenses required where they are not requested. ***State v. Hoffman***, 116 Wn. 2d at 111-112; ***State v. Mak***, 105 Wn.2d 692, 747, 718 P. 2d 407 (1986); ***State v. Red,*** 105 Wn. App. 62 65, 18 P.3d 615 (2001).

Grier places the trial court in the position of giving instructions that neither party has requested and there is no issue regarding legal error. This puts the Court in the difficult position of reviewing trial strategies or doing a job required of counsel in CrR 6.15.

Grier, ***Ward,*** and ***Pittman*** give no guidance as to under what circumstances or with what facts and evidence the court may or should act. Under the facts and circumstances in ***Grier***, the trial court must give the instructions on lesser included offenses in every case.

D. CONCLUSION.

The defendant in the present case exercised her fundamental right to determine the basic objective of her case: an acquittal. It is not ineffective assistance of counsel where her attorney pursued that objective, but was unsuccessful. For the reasons argued above, the State respectfully

requests the Supreme Court to reverse ***State v. Grier*** and affirm the conviction.

DATED: February 25, 2010.

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Pierce County
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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/25/10 Johnson
Date Signature